BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANIEL H. CUPPERNELL	)	
Claimant	)	
	)	
VS.	)	
	)	
WAL-MART	)	
Respondent	)	Docket Nos. 1,007,010
	)	1,007,011
AND	)	
	)	
AMERICAN HOME ASSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requests review of a preliminary hearing Order entered by Administrative Law Judge John D. Clark on January 7, 2003.

ISSUES

Claimant testified that on August 10, 2002, while lifting a case of milk he injured his back. The Administrative Law Judge (ALJ) determined claimant injured his back at work on that date and that on August 16, 2002, respondent had notice of that injury.

Respondent denies claimant met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment. Respondent also denies the claimant gave timely notice pursuant to K.S.A. 44-520. Respondent's store manager and co-manager both deny claimant gave them notice of the August 10, 2002, incident until October 23, 2002, when he filled out the report of accident.

Claimant contends that on August 16, 2002, he told both the store manager and co-manager about the incident where he injured his back lifting a case of milk. Consequently, claimant contends the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

As claimant lifted a case of milk above his head he felt a sharp pain in the middle of his lower back. He continued working. After he got off work the pain worsened and claimant sought emergency room treatment. He was given medications and taken off work. He then scheduled an August 16, 2002, appointment with Dr. Michael D. Grimes, his personal physician.

Dr. Grimes' medical record of that visit contained a history of back pain for approximately six months which had recently worsened. Although there is no mention of an acute injury, the medical record noted claimant did a lot of heavy lifting at work moving milk crates. Dr. Grimes took claimant off work and imposed restrictions against lifting greater than 10 pounds.

Claimant testified that when he returned to work he told the store manager and co-manager about the incident. He also gave them Dr. Grimes' release and restrictions. Claimant testified that they advised him that the injury could have happened anywhere and claimant did not know it was work related.

Respondent's store manager, Pat O'Nelio, and co-manager, Jeremy Smith, both denied claimant told him he had suffered a back injury at work until after claimant suffered a second injury in October 2002. But Mr. Smith agreed claimant had brought him work restrictions due to low back pain. After a few days claimant was called and returned to accommodated work.

On October 11, 2002, while lifting a crate claimant's left knee popped and he fell to the floor on his back. Claimant remained on the floor while a co-worker summoned Mr. Smith. Claimant was lifted onto a chair and then placed in a wheelchair. Claimant testified that Mr. Smith told him that he was not going to fill out an accident report because claimant had been complaining about knee pain. Claimant was told to go see his own doctor. Mr. Smith's contradictory testimony was that claimant had said his knee injury was not work-related and that is why an accident report was not immediately prepared.

For an injury to be compensable, a claimant must prove that the injury was caused by an accident which arose out of and occurred in the course of employment.[1] An injury is also compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[2] In such cases, the test is not whether the

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[1] K.S.A. 44-501(a).

[2] *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971); *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. ___ (2001).

accident caused the condition, but whether the accident aggravated or accelerated a preexisting condition.[3]

Workers have the burden of proof to establish their rights to compensation and to prove the various conditions upon which those rights depend.[4] "Burden of proof" means the burden to persuade by a preponderance of the credible evidence that a party's position on an issue is more probably true than not when considering the whole record.[5]

Claimant relates his back injury to his work. The medical records in evidence neither specifically relate claimant's back condition to his work, nor do they exclude work as a cause. But Dr. Grimes' medical records do make specific reference to heavy lifting at work. Based upon the record compiled to date, the Board finds claimant has met his burden of proof to establish he suffered accidental injury while working for respondent.

The testimony is conflicting on the dispositive issue whether the claimant gave timely notice of the August 10, 2002, accident. The claimant alleges he advised both the store manager and the co-manager that lifting at work was the cause of his back problems. The co-manager agreed that claimant provided a release slip from his doctor but denied that claimant ever alleged that his need for treatment was work-related.

The Workers Compensation Act requires workers to give notice of their accidental injury within 10 days of when it occurs. But that 10-day period may be extended to 75 days if the worker has just cause for failing to notify the employer within the initial 10-day period following the accident. Further, the employer's actual knowledge of the accident renders the giving of such notice unnecessary.[6]

The Board finds the preliminary hearing record contains testimony from Mr. O'Nelio and Mr. Smith that directly conflicts with claimant's testimony. The Board finds the ALJ, in granting claimant medical treatment and specifically finding that notice was provided respondent on August 16, 2002, had to conclude that claimant's testimony was truthful. The ALJ had the opportunity to evaluate both of respondent's managers credibility because both witnesses testified in person at the preliminary hearing. In circumstances such as this, where conflicting evidence provides more than one possible answer, the Board finds it is appropriate to give some deference to the ALJ's conclusions. And Dr. Grimes' medical record dated August 16,2002, noted claimant did a lot of heavy lifting at work moving milk

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[3] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[4] K.S.A. 44-501(a).

[5] K.S.A. 44-508(g).

[6] See K.S.A. 44-520.

cartons and crates. Therefore, at this point in the proceedings and giving some deference to the ALJ's conclusions, the Board finds claimant provided respondent with timely notice of the accident.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[7]

AWARD

WHEREFORE, Administrative Law Judge John D. Clark's Order dated January 7, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2003.

_____
BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
James B. Biggs, Attorney for Respondent
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation

[7] K.S.A. 44-534a(a)(2).